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United Nations Commission on International Trade Law

Thirty-fifth session

Summary record of the 746th meeting
Held at Headquarters, New York, on Thursday, 20 June 2002, at 3 p.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

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Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*)

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In the absence of Mr. Akam Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 3.15 p.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*) (A/CN.9/506, A/CN.9/513 and Add.1-2 and A/CN.9/514; A/CN.9/XXXV/CRP.3)

Draft article 15. Enforceability of settlement agreement

1. **The Chairman** said the question of the enforceability of settlement agreements had been discussed in some detail at the previous session of the Commission, and the present wording represented the maximum degree of consensus which could be achieved at that time. An exchange of views had taken place by electronic mail in the meantime, but it had been inconclusive.

2. **Mr. Sekolec** (Secretary of the Commission) said the nature of the settlement agreement had been left open-ended. As presently drafted, the text of draft article 15 did not make clear that such agreements were enforceable as contracts, although there was broad agreement in the Commission that they were. Some members had queried the meaning of "binding and enforceable", and there was a notion that those words implied the force of a judicial decision. It would be appropriate to provide some clarification, at least in the draft Guide to Enactment.

3. **Mr. Jacquet** (France), referring to the written observations submitted by his delegation, suggested deleting the words "and enforceable". If that was done, the enforceability of the agreement, in a judicial sense, would depend on the local law. He suggested the wording: "The enforceability of the agreement will depend on the law applied by the competent authority of the State where the agreement is invoked".

4. **Mr. Sekolec** (Secretary of the Commission) said that would be the law of the enacting State. Because the Model Law was not a treaty, it could not establish a regime outside the country which adopted it.

5. **Mr. Jacquet** (France) agreed to the phrase "the law of the enacting State", which was a standard formula in model laws adopted by the Commission.

6. *Draft article 15 was provisionally approved.*

Draft article 3. Variation by agreement (*continued*)

7. **The Chairman** said it was necessary to revert to draft article 3 in order to determine which articles of the Model Law, in addition to articles 2 and 7, paragraph (3), were not subject to variation by agreement between the parties. It had already been suggested, by the representative of Sweden, that draft article 14 should be included in the scope of draft article 3.

8. **Mr. Möller** (Observer for Finland) said he was not in favour of including a reference to draft article 14. Even if the parties had expressly undertaken not to resort to arbitral or judicial proceedings for a specified period of time, they should be allowed to make alternative arrangements.

9. **Ms. Renfors** (Sweden) said she was not insisting on a reference to draft article 14 in draft article 3. However, some action must be taken to resolve the uncertainty surrounding the relationship between the two articles. As matters stood, the effect of the amendment to draft article 14 would be that parties to a conciliation who had agreed they would not be allowed to have recourse to arbitral or judicial proceedings could nevertheless go to court to preserve their rights.

10. **The Chairman** said the inconsistency could be removed by including in the agreement a clause to waive the provision in draft article 14 which enabled a party to have recourse to the courts.

11. **Mr. Markus** (Observer for Switzerland) said he agreed with the representative of Sweden that draft article 14 would have a strange effect if it were non-mandatory. It would be saying that effect must be given to an agreement by the parties not to go to court until a certain period had elapsed, but would at the same time be limiting that effect for the sake of preserving a party's rights. If the intention was to limit the effect of article 14 in that way, the rule in it must be a mandatory one. The Model Law was a mixture of contractual and procedural provisions, but most of its rules were contractual, and rules of that kind were always subject to party autonomy. Draft article 14 was one of the few procedural rules in the Model Law, because by defining the limit to be set it was telling the courts whether an action by one of the parties should be admitted. Draft article 14 should therefore be mandatory.

12. **The Chairman** raised the question whether draft article 11, on the admissibility of evidence in other proceedings, should also become mandatory.

13. **Mr. Jacquet** (France) was not in favour of including in draft article 3 a reference to draft article 14. Logically speaking, draft article 14 was an optional clause. It empowered the parties to have recourse to arbitral or judicial proceedings if they so chose. To attempt to make it mandatory would be a grave mistake.

14. **Mr. Graham** (Mexico) said he too opposed the idea of including in draft article 3 a reference to draft article 14, but for a different reason. It would be inconsistent to seek to attribute binding effect to a rule which could only take effect by virtue of an agreement between the parties.

15. **Mr. Heger** (Germany) said he believed it would be a good idea to include in draft article 3 a reference to draft article 14. The situation was one in which parties were to be protected from the consequences of their own errors. In that sense, the possibility of recourse to judicial proceedings was a matter of principle that had more to do with constitutional law than with procedural law. He was far from sure that, from a logical point of view, there were no circumstances in which it would be unnecessary for draft article 14 to be mandatory.

16. **Mr. Morán Bovio** (Spain) said he did not agree that article 14 should be mentioned in draft article 3. The free will of the parties should be paramount. Given that draft article 14 only entered into force by agreement of the parties, and was therefore derogable by its very nature, it made no sense to make it non-derogable by virtue of draft article 3. Article 14 did not belong in the same category as article 2 and article 7, paragraph (3).

17. **Mr. Marsh** (United Kingdom) said that, in his understanding, draft article 14 was intended to ensure that whenever parties made a commitment to use conciliation, they could not, to the extent provided for, renege on that commitment. While that objective was laudable, reference to article 14 in draft article 3 would mean that even when both parties no longer decided that conciliation was appropriate, they would be forced to continue with it nevertheless. That would be a strange and unfortunate provision.

18. **Mr. Holtzmann** (United States of America) said that parties making an agreement under the provisions of draft article 14 ought to be permitted to change that agreement. It should be recalled that in a conciliation procedure, any party was entitled to stop conciliating at any given moment. By removing the freedom of parties to change an agreement, the inclusion of article 14 in draft article 3 would simply result in more parties pulling out of conciliation altogether. He urged strongly for article 14 not to be referred to in draft article 3.

19. **Mr. Barsy** (Sudan) said that his delegation could not agree to a reference to article 14 in draft article 3. Parties should be free to change their minds about the usefulness of arbitral or judicial proceedings, with a view to facilitating the swift resolution of disputes.

20. **Mr. Sekolec** (Secretary of the Commission) asked delegates to consider a situation in which a party, having agreed not to resort to arbitral or judicial proceedings during a conciliation period of 60 days, decided to alter that position before the end of the agreement period. According to the second part of draft article 14, that party would still be entitled to go to court to preserve its rights. Yet, by virtue of draft article 3, parties might have agreed for that right to be removed, and such an agreement would have to be respected. In that case, it would be unclear which provisions prevailed: those in draft article 14, or those in draft article 3.

21. **The Chairman**, speaking in his personal capacity, said that one interpretation was that parties agreeing to a period of 60 days for conciliation were implicitly derogating from the provisions of draft article 12, which established conditions for the termination of conciliation. Another was that by agreeing not to resort to arbitral or judicial proceedings for a period of 60 days, parties were agreeing to a cooling-off period, during which legal action would not be taken, even if conciliation should fail. That provision existed in bilateral investment treaties, for instance, whereby parties agreed to a period of six months without recourse to arbitration.

22. **Mr. Morán Bovio** (Spain) said, in response to the question raised by the Secretary of the Commission, that the general principle underlying the draft Model Law ought to be party autonomy. Despite having committed themselves to a period without arbitration or legal proceedings, parties should be free to alter their

position if they deemed it necessary to defend their interests. For example, one of the parties might fail to demonstrate satisfactory sincerity with regard to the conciliation process, leading the other either to consider or to initiate legal action, while at the same time continuing to conciliate. Parties must be able to protect their rights in such circumstances. It should also be recalled that, owing to the complexity of commercial relationships, the decision by one party to take legal action should not necessarily affect the conciliation process between the remaining parties.

23. **Mr. Markus** (Observer for Switzerland) said that there was an inherent contradiction in failing to make draft article 14 non-derogable. Without including the second part of article 14 under the terms of draft article 3, it would be possible for parties to agree to a cooling-off period of 60 days, and to commit themselves not to go to court even if they deemed it necessary to preserve their respective rights. In his view, it was impossible to allow the restriction of the right to initiate legal proceedings without rendering the second part of draft article 14 meaningless.

24. **Ms. Renfors** (Sweden) said that, in the situation described by the Secretary of the Commission, the provisions of draft article 14 should prevail. Only the second half of draft article 14 should be non-derogable, since clearly the freedom to enter into an agreement could not be made mandatory.

25. **Mr. Heger** (Germany) said that the example given by the Observer for Switzerland showed very clearly the consequences of failing to include draft article 14 under the terms of draft article 3.

26. **Mr. Morán Bovio** (Spain) asked whether a party which, having entered into an agreement not to resort to judicial proceedings during a period of conciliation, subsequently discovered enough about the other party's financial situation to consider that it had a duty to initiate bankruptcy proceedings against that party, should be prevented from doing so by virtue of the initial agreement.

27. **Mr. Shimizu** (Japan) said that if draft article 3 contained no reference to draft article 14, in the situation described by the Secretary of the Commission, the rules contained in draft article 3 concerning the free will of the parties would prevail. The provisions of draft article 14 were intended to fill in the gaps where the intention of the parties remained unclear. It assumed that an agreement in which the parties expressly undertook not to litigate did not exclude the possibility of going to court to protect their rights. The constitutional problem raised by the representative of Germany lay outside the scope of the draft Model Law, and should be resolved within the general framework of the relationship between contractual law and public policy.

28. **The Chairman** said that, unless any objections were raised, draft article 3 would remain as it appeared in the text, without the insertion of a reference to article 14.

29. **Mr. Jacquet** (France) said that it had yet to be decided whether or not article 15 would be referred to in draft article 3.

The meeting was suspended at 4.25 p.m. and resumed at 5.05 p.m.

30. **Mr. Jacquet** (France) said it would be detrimental to the consistency of the Model Law for the agreement reached by the parties following conciliation to be interpreted differently in different countries. Article 15 should be among those articles that could not be changed.

31. **Mr. Tang** Houzhi (China) said he agreed with the French representative that draft article 15 should be mandatory and should be included in draft article 3.

32. **Mr. García Feraud** (Observer for Ecuador) said he agreed that draft article 15 should be included in draft article 3. The conciliation exercise would be weakened if the end result was left up to the will of the parties. Moreover, the Model Law was intended to promote conciliation, and that could best be done by ensuring that the settlement agreement would be enforceable.

33. **Mr. Getty** (United States of America) said that his delegation was opposed to the inclusion of draft article 15 in draft article 3. By its very nature, draft article 15 invited enacting States to specify methods of enforcement. Under the principle of party autonomy, parties might agree that they wished to have enforcement in accordance with the laws of a specific State and not with those of another. Draft article 15 invited a variation based upon a difference in laws. In the United States, for example, the article would probably be considered binding and enforceable as a contract; in other jurisdictions it might be enforceable as a judgement, and in yet others, as an arbitral award. All of those possibilities were valid ways that States

might choose to have enforcement. It would be inherently contradictory to say that draft article 15, which could be varied by individual States, could not be varied by the parties.

34. **The Chairman** said that as he understood it, the French delegation had argued that the parties could not deny the mandatory effect of agreements that were legally valid, while the United States had raised the point that the parties could agree that the enforcement procedure was a matter of choice of forum. In that case, the two positions were not in opposition to each other.

35. **Mr. Markus** (Observer for Switzerland) said that he supported the French proposal with one reservation. The enforceability of a conciliation agreement was based on a State monopoly, inasmuch as it was the State that made the proceedings available. The parties would never be able to agree on enforcement beyond the terms stipulated in the State's procedural laws. For that reason, he supported the French proposal. On the other hand, it should always be possible for the parties to partially or completely give up those elements of enforcement. They might wish to decide that a conciliation agreement would only bind them in certain aspects. It might be worthwhile to mention that possibility in the Guide, in connection with article 3 or article 15. It was important to respect the principle of party autonomy.

36. **Mr. Marsh** (United Kingdom) said that his delegation had considerable reservations about the inclusion of draft article 15 within the articles referred to in draft article 3. The nature of the conciliation process was such as to encourage and enable the parties to reach their own settlement. It followed from that that the parties would put into the settlement whatever it was that they wanted to see in it. One such provision might well be that they did not wish the settlement agreement to be binding. One example might be that of three joint venture partners from different countries who had a disagreement about a matter of strategy or business priority. There was no reason why they should not use a conciliator to help them resolve the matter. In doing so, they would be seeking assistance in reaching a business strategy for the future; they would not be looking to create legally binding obligations. They would not expect to be bound by contractual obligations. He saw no reason why they should not be entitled to use the conciliation process. For pragmatic reasons and so as not to limit the use of conciliation in situations such as that, his delegation was in favour of excluding draft article 15 from the references in draft article 3.

37. **Mr. Jacquet** (France) said that the example just provided by the United Kingdom was inconclusive and did not fall within the scope of draft article 1 of the Model Law. It was not clear why the parties in that example would see a need to have recourse to a decision that would be binding. Their dispute would not be legal in nature, but would simply be an issue of commercial strategy.

38. He did not understand why the United States delegation had remained silent on the French proposal for a new wording of draft article 15. What the representative of the United States had just said was precisely what the French delegation had proposed, namely, that when a conciliation agreement had been reached, the parties were free to choose the country in which they wanted the legal consequences of their conciliation agreement to take effect. The rationale of the conciliation agreement was that the parties ended up with a contract; that was what France had proposed. In fact, France had proposed that in draft article 15 there should be a period after the word "binding"; beyond what was binding, the parties would move on to domestic law. That was the position that had been expressed by the United States representative and thus there was no contradiction between the two positions. There was no strong reason to oppose the inclusion of draft article 15 in draft article 3. It was unfortunate that the situation had not become clear earlier; the problem he saw now was that article 15 was more binding than the United States delegation wanted it to be. If the text was amended to end with the word "binding", then the article could stand on its own. The inclusion of the term "enforceable" created problems because it would have meaning only with respect to national legislation.

39. **Mr. Lebedev** (Russian Federation) said that the issue was a very complex one because currently there was no article 15, but only the introduction to the article. It was his understanding that so far no decision had been taken to amend the three lines of the draft article. According to that text, the States adopting the Model Law would have to establish the conditions and procedures to be followed in implementing the international agreement between the parties. It was very difficult, without knowing what laws the individual States would enact, to take a decision as to

whether the article should be classified under the binding or non-binding rules of the Model Law.

40. Another issue, which might appear to be purely academic but which nevertheless must be considered, was the situation that would arise if the conciliation procedure took place in a particular State in which the Model Law was applicable and the parties agreed that the conciliation agreement should be implemented in the territory of another State where different rules applied. If it was felt that article 15 was binding or mandatory, then the problem was to decide whether the parties could agree not to apply article 15 in a particular State but rather to apply it in another State.

41. The solution might be to refer to the matter in the Guide instead of including article 15 in article 3. That way, each State could decide for itself, when adopting the law, whether to include a reference to article 15 in article 3. Another possible scenario would be to include article 15 in article 3, but to add a footnote to the effect that when adopting the law, States might decide for themselves whether or not to maintain the reference to article 15 in article 3.

42. **Mr. Sekolec** (Secretary of the Commission) said that it appeared from the discussion that the English text of draft article 15 said something different than the French text. The French text spoke of "executory force", which had to do with a procedural aspect of the settlement agreement, whereas the English text spoke of the binding and enforceable nature of a contract. It might be necessary to change the French text.

43. **Mr. Zanker** (Observer for Australia) said that he had thought that draft article 15 was complete as it stood, ending "that settlement agreement is binding and enforceable". The words "as a contract" had been dropped, but the terms used implied a contract. For the reasons stated by the United Kingdom and the United States, his delegation was not in favour of a reference to draft article 15 as a mandatory provision in draft article 3.

44. **Mr. Möller** (Observer for Finland) said that if draft article 15 was considered to be in a partial state, requiring completion by the particular State, that was another reason for not mentioning it as mandatory in draft article 3, since the Commission could not know what it would contain in its final form. The absence of a reference would not make a practical difference. If the parties did not wish to have a settlement agreement that was binding and enforceable, any arrangement they made was not a settlement agreement in the strict sense of the term.

45. **Mr. Shimizu** (Japan) said that his delegation was opposed to the inclusion of a reference to draft article 15 in draft article 3. It had been left to the particular State to decide whether draft article 15 should be mandatory or not. An explanation in the Guide to Enactment should resolve the problem.

46. **The Chairman** suggested that a solution might be reached by analysing the elements of draft article 15 separately to determine whether they might be subject to variation by agreement or not. To say that the settlement agreement was binding was merely to follow the law of contracts and could hardly be altered. To say that it was enforceable might lead to a consideration of legal procedures, although in Mexican law "ejecutorio" meant little more than "vinculante"; "ejecutivo" would have stronger implications.

47. **Mr. Barsy** (Sudan) said that it seemed natural to refer to draft article 15 in draft article 3. Parties resorted to conciliation when a dispute had arisen under law, with the intention that a settlement agreement should be enforceable; otherwise, conciliation was meaningless. No cases had come to his attention in which the parties did not want to have an enforceable agreement.

48. **Mr. Tang** Houzhi (China) said that his delegation strongly supported the inclusion of a reference to draft article 15 in draft article 3. The essential purpose of elaborating a model law was to make a conciliation settlement agreement enforceable; that was what made conciliation worthwhile. He himself had not encountered cases in which the parties did not wish their agreement to be enforceable. The example cited by the United Kingdom delegation of parties' bringing in a third party to help them work out a strategy did not involve a dispute and could not be considered a conciliation proceeding. Some delegations argued that making enforceability mandatory might discourage some parties from resorting to conciliation, but he felt that, on the contrary, parties would be dissuaded from conciliation if the resulting agreement was not binding and enforceable, because of the waste of time and energy involved.

49. With regard to consistency between language versions, the Chinese, at least, was clear and gave an accurate rendering of the English terms "binding and enforceable". It was his understanding that the wording

of draft article 15 had been approved, even though the matter in brackets would be left to each State to fill in. Therefore, there was no reason to defer a decision on a reference to it in draft article 3. Failure to make draft article 15 mandatory would deprive the Model Law of much of its significance. To ensure consistency, draft footnote 4, which said that an enacting State might consider the possibility of an enforcement procedure being mandatory, should perhaps be looked at again.

50. **Mr. Heger** (Germany) said that, given the uncertainties surrounding draft article 15, his delegation did not think that a reference to it should be included in draft article 3.

51. **Mr. Kovar** (United States of America) stressed that, in the view of his delegation, to deny the parties the option of entering into any kind of settlement agreement they wanted would undermine the purpose of the Model Law. The essence of conciliation was that it was a voluntary process, intended to enable parties to reach their own resolution of their dispute. They might simply agree, for example, to take certain steps to restore confidence in their business relationship. The situation described by the United Kingdom delegation could well arise from a contract dispute and be considered conciliation. If every accord reached by the parties had to take the form of a binding contract or the equivalent of an arbitral award or judgement, it would severely limit party autonomy, which was the essence of conciliation.

52. His delegation was unclear about the link between the choice of law problem raised by France and variation by agreement, but he suspected that it was a point that should be addressed under national law. As other delegations had pointed out, draft footnote 4 left an enacting State the option of making enforcement procedures under draft article 15 mandatory.

The meeting rose at 6 p.m.